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GLENN MARTYN  
PETSCAPE, INC.  
4440 BRIGHTON BLVD  
MIMS, FL 32754

In re Application of  
Glenn Joseph Martyn  
Application No. 09/945,501  
Filed: August 31, 2001  
Title of Invention: CAT TREE, LITTER BOX,  
AND WATERFALL DEVICES

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OFFICE OF PETITIONS

ON PETITION

**CORRECTED DECISION<sup>1</sup>**

This is a decision on the second renewed petition filed April 13, 2006, to withdraw the holding of abandonment under 37 CFR 1.181, in accordance with the reasoning of the decision in Delgar Inc. v. Schuyler, 172 USPQ 513.

The petition under 37 CFR 1.181 is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181," or, as explained in more detail below, "...under 37 CFR 1.137(a)" or (b). This is not a final agency decision.

The above-referenced application was held abandoned on April 20, 2004 for failure to timely pay the issue fee in response to the Notice of Allowance mailed February 19, 2004. Accordingly, a Notice of Abandonment was mailed July 6, 2004. A petition filed August 10, 2004 to withdraw the holding of abandonment was dismissed in a decision mailed September 10, 2004 because the evidence presented was insufficient to prove non-receipt of the Notice of Allowance in the instant application. A renewed petition filed March 20, 2006 was again dismissed in a decision mailed April 5, 2006.

Comes now petitioner with a second renewed petition arguing that the Notice of Allowance mailed February 19, 2004 was never received even though the file record discloses that the Notice of Allowance was mailed to what was believed to be the address of record.

<sup>1</sup>This decision is re-mailed for the purposes of correcting the mailing address pursuant to the March 20, 2006 request to change the correspondence address. The period for reply runs from the mail date of this decision.

As in the previous two decisions, it was set out that in a petition under 37 CFR 1.181 the petitioner must show, as in this instance where non-receipt is claimed that petitioner is without fault in not receiving the communication. In the absence of any irregularity in the mailing, there is a strong presumption that the Office action was properly mailed to the address of record. This presumption may be overcome by a showing that the Office action was not in fact received at the address of record. As was indicated in the decision on petition mailed September 10, 2004, the requirement for an argument under 37 CFR 1.181 is that copies of the actual docket records or file jacket be provided. That requirement has still not been met.

As with the petitioner's previous two efforts to have the holding of abandonment withdrawn, petitioner has provided an explanation as to the handling of and docketing of mail but as with the previous efforts, petitioner has still not provided copies of the actual docket records or file jackets. The instant petition reiterates the same arguments made in the petitions filed August 10, 2004 and March 20, 2005 and in each decision dismissing the petition, petitioner is advised to either provide the office with a showing or file a petition to revive under 37 CFR 1.137(a) or (b).

The two step process used by the petitioner and his father in law, in retrieving the mail and filing the mail is just one part of the showing required. The agency is most concerned that if after retrieving the mail that perhaps it got lost by petitioner or his father-in law and without a showing of the file jacket and a notation thereon, where the mail would have been stored had it been received, there is no proof that the petitioner was not at fault in this instance.

Section 1.137(b) now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
- (2) the petition fee as set forth in 37 CFR 1.17(m) (\$675.00);
- (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was

unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

In view thereof, the holding of abandonment cannot be withdrawn.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition  
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By FAX: (571) 273-8300

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.



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